Office Supreme Court U. S.
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1,517.

THE CITY OF CLAY CENTER, KANS., Appellant,

vs.

THE FARMERS' LOAN AND TRUST COMPANY, Appellee.

Brief of Appellant in reply to Motion of Appellee to Dismiss Appeal.

The motion in this case is to dismiss the appeal on two grounds:

First. That the appellant did not file the transcript of the record and enter an appearance within the time prescribed by Rule IX. We are advised that this ground is not pressed by counsel for the appellee; consequently we shall not argue it.

Secondly. The motion is based upon the further ground that the amount involved is insufficient to give jurisdiction to this court on appeal.

It is true that the amount of the money judgment in this case is only $4,042.65, and, *prima facie*, this would be the test of the question of jurisdiction; but the court will examine the whole record and ascertain from that the amount which is exactly the subject of the conten-

tion. An examination of the pleadings and of the decree in the cause promptly discloses the fact that the amount for which the money judgment could be rendered is by no means the measure of the amount involved in this case; and when we say involved, we do not mean incidentally and collaterally, but we mean directly the subject-matter of the suit, and, when compared with it, the money judgment becomes a mere incident.

Let us remember, in the first instance, that this is a proceeding *in equity*, and turning to the bill itself, in the second paragraph, at the sixth folio, we see the commencement of a series of material allegations as to the contract and provisions for the issuing of bonds under an ordinance of the city council of the city of Clay Center, which municipal corporation is the appellant here. In the seventh folio we find a further allegation that the appellant "duly accepted said works, and recognized the same as being constructed in accordance with the provisions of said *ordinance*," and following this is the further allegation of the issuance of the $60,000 of bonds. Again, in the ninth folio is the allegation that "the trust deed executed to the appellee in this case *recited the ordinance* authorizing the issuance of the bonds, and that the hydrant rental in said *ordinance* made and appropriated was in terms set over and transferred to said trustee, and by virtue of the terms of said ordinance as security," etc. Each and all of these allegations go to show conclusively that the existence of a contract made in pursuance of an alleged ordinance of the municipal corporation, which is the appellant, here was a material and important part of the basis of the proceeding; and when we turn to the prayer at the end of the eleventh folio, we find there that it is the chief and material part of the subject of litigation, and that the foremost part of the prayer is that the appellant here "*may be decreed to have engaged and contracted with your*

orator to pay directly to your orator, in trust for the benefit of the holders of said bonds, all or so much of said hydrant rental provided for in said ordinance as may be necessary to pay the interest of said bonds"; and we submit that the language of this prayer of the bill is conclusive of the fact that a decree as to the validity of the engagement and contract based upon the "said ordinance" was an important, material, and essential part of the subject of litigation in this case; that it was not incidental to the question of hydrant rent due; that the prayer for the amount of interest follows and is subordinated to this, and, lastly, that if the recovery of the hydrant rent to pay interest was the only question involved, there would have been no equity on the face of the bill, and the proceeding must necessarily have been at common law.

Now, as a further test of what was the issue in this case, let us turn to the answer of the appellant, which will be found on page 42, folio 63 of the record; and in the second paragraph in said answer, which is found in folio 63, we are met with a direct and positive denial that any "such ordinance as that described in said bill" was ever passed and adopted by said city, or by the mayor and council thereof. Then in the third paragraph of the answer, at folio 64, we see the express denial "that the execution of the said contract alleged in said bill" had the force or effect to bind or obligate the appellant. From these references to the bill and answer it is evident that the complainant and defendant both regarded the legality of the alleged ordinance, and the validity of the alleged contract claimed to have been made in pursuance thereof, as the material and fundamental subject of the litigation; that the bill in equity was filed for the construction and enforcement of these, and to have it decreed by the court of equity that the alleged ordinance was valid and the contract alleged to have been made

in pursuance of it obligatory. And upon this construction the question of rent due, and therefore of its applicability to interest due upon the $60,000 of bonds, the said rent was a mere incident, and, except for the vital questions as to the construction of the court upon the validity of the ordinance and the obligation of the contract, the interposition of a court of equity could never have been had upon the mere question of debt for rent.

These allegations and the prayer, together with the decree of the court, are conclusive that to have the ordinance decreed valid and the contract obligatory make the real matter in dispute the whole hydrant rental during the entire term which the $60,000 of bonds had to run.

Let us now see the view which the court took of this matter. The decree of the court will be found on page 49, folio 219, and begins by stating that "the court doth find that the allegations and averments contained in said bill of complaint are true." So much is as to the facts in the case; and immediately follows the court's legal construction upon those facts, to wit, "and doth further find that the said city of Clay Center engaged and contracted as in said complaint alleged," and goes on to adjudge and decree "that said ordinance and contract do make and constitute a lawful, valid, and binding obligation on the part of said city of Clay Center."

These are the facts of the case as disclosed by the proceedings and decree of the court, and we submit that this case is covered entirely by the case of Stinson *vs.* Dousman, reported in 20 Howard, page 461. It was an action to recover *rent* of a parcel of land in the city of St. Paul, but in the opinion of Justice Campbell, on page 464, he uses this language: "The answer of the defendant is framed not only to present the legal defense against the claim preferred in the petition, but also to obtain a decree affirmative of the continuing validity of the

contract and sale." In this case, therefore, the prayer for equitable relief is based exclusively upon the grounds set forth by the defendant in his answer. But in the case at bar our proposition is stronger from the fact that the prayer for affirmative equitable relief is the gravamen of the bill itself, and except that the ordinance of the appellant and of the alleged contract made thereunder should be decreed to be valid and obligatory, then there could have been no rent due, and the money judgment was a mere incident of this decree of construction of the ordinance and contract by the chancellor. For the convenience of the court we print the concluding paragraphs of the opinion of Justice Campbell:

"The defendant in error objected that the matter in dispute was not of the value of $1,000, and therefore this court had not jurisdiction of the cause. The objection might be well founded if this was to be regarded merely as an action at common law.

"But the equitable, as well as the legal, considerations involved in the cause are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit.

"The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at $8,000."

This decision was prior to the act of February 16, 1875, which now governs the court, but in Gibson *vs.* Shufeldt (122 U. S., 28) there is an elaborate and admirable review as to the cases bearing upon this question, and in it the court shows that the only difference between the statute now and that of force when Justice Campbell rendered the opinion of the court in Stinson *vs.* Dousman is the change of the amount of the matter in dispute from

$2,000 to $5,000, so that the reasoning of the last-named decision is as applicable to the questions in the case at bar as the more recent decisions of the court. The question is, What is the amount of the "real matter in dispute"?—not what may be the incidental and collateral effect of the suit, as in the case of Gibson *vs.* Shufeldt, or "the probative force of the judgment itself in some subsequent proceeding," or "its collateral effect in a subsequent suit between the same or other parties," as in Elgin *vs.* Marshall, but the real amount of the matter in dispute is shown by the record in the case; and in the case at bar we show this real amount by the allegation and averments in the bill, by the denials in the answer, and by the decree of the court from which the appeal is taken; and we submit that unquestionably these show that while the rental due was a part of the matter in dispute, it was a minor and subordinate part only, the construction of the contract and the validity of the ordinance upon which it was based being the important and material question involved, because it settled and fixed the liability for the continued application of the hydrant rent to the payment of interest on $60,000 of bonds for a long series of years, and it was the question of this construction of the ordinance and contract which gave the complainants their status in court, was the material part of their prayer for relief, was the subject of denials and of the litigation raised by the answer, and was the material issue decided by the decree of the chancellor; and it is exactly this decree which this appeal is brought for the purpose of reversing, and which shows conclusively that the matter which is directly in dispute is not the two semi-annual installments of hydrant rent, amounting to $4,042.65, but the *liability* of the plaintiff under the contract made under the ordinance which is alleged to be invalid, and which vastly exceeds the amount of the statutory jurisdiction on appeal.

We submit it is unnecessary to trespass on the court to review the numerous decisions cited by the attorney for the appellee in his brief, as your honors are exceedingly familiar with them; but we merely desire to remark that an examination of the case of Elgin *vs.* Marshall, which seems to be chiefly relied upon, shows that the entire effort to sustain the jurisdiction of the court depended upon the fact that the decision upon the validity of the coupons in suit detached from the municipal bonds, amounting to less than $5,000, would be used "as an estoppel in subsequent proceedings" upon other coupons from the same bonds, or coupons of other bonds of the same class, exceeding in amount the jurisdiction of the court; and in that case Mr. Justice Matthews, delivering the opinion of the court, reviews a number of the decisions bearing upon this phase of the question, and among them that of Stinson *vs.* Dousman, from 20 Howard, *supra*, in which the right of appeal was sustained, and says (on page 582 of 106 U. S.): "The effect of the judgment was to adjust the legal and equitable claims of the parties to the subject of the suit, which was not merely the amount of the rent claimed, but the title of the respective parties to the land. On that ground alone the jurisdiction of the court was upheld."

So in the case at bar. "The amount involved" was not merely the alleged rental due, but also the liability in equity of the parties on the contract which was expressly prayed should be decreed, and was so decreed.

The liability on the contract and the validity of the entire series of bonds on which the city was to pay interest depended on the validity of the ordinance, and a decree declaring it valid was expressly prayed, and it was so decreed.

Wm E. Earle

Wm T. Curtis

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CASE No. 13,507.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891. TERM NO. 339.

THE CITY OF CLAY CENTER, *Appellant*,
vs.
THE FARMERS' LOAN AND TRUST COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

(The pages referred to are the pages of the printed record.)

The chief allegations of the complaint (p. 1) filed by the appellee in the circuit court, are;

That about January 1, 1884, the city of Clay Center (the appellant), by ordinance, contracted with one John E. Bonebrake for the erection and operation of a system of water works in said city; that said ordinance, after its passage, was incorporated into a contract (p. 7) signed by said Bonebrake and by the mayor and clerk of said city; that at the time said contract was made, it was understood that a company was to be incorporated,

to whom said Bonebrake would transfer his rights and obligations under said contract; that said contract contained provisions for the payment of hydrant rental by said city, and that in case said Bonebrake, or his assigns, should issue first mortgage bonds upon the water works, so much of the hydrant rental as should be necessary to pay the interest on the bonds should be paid semi-annually to the bondhoiders or their trustees, and the residue, if any, to said Bonebrake or his assigns; that in pursuance of such understanding, the Clay Center Water Company was incorporated, and by assignment, succeeded to all of said Bonebrake's rights and obligations under said contract; that said water company proceeded to construct water works in accordance with said contract, which water works were tested, inspected and received by the city; that for the construction of said water works, said water company, with the knowledge and consent of said city, issued its negotiable bonds to the amount of $60,000, running twenty years at seven per cent per annum interest, and secured the payment of the same by a trust deed of the property and franchises of said water company; that said trust deed was issued to the appellee as trustee for the bondholders, and that the bonds were sold to and are now held by "divers and sundry persons;" that by the terms of said contract, there became due for hydrant rental from said city to said trustee, on January 10, 1887, $1,850, and on June 10, 1887, the further sum of $1,850.

The chief allegations of appellant's answer (p. 42) to said complaint are:

That the city never entered into the contract alleged

in the complaint; that no such ordinance as that alleged in the complaint was ever passed or adopted by said city in the manner required by law; that the mayor of said city had no authority to make said contract on behalf of the city; that said Bonebrake, said water company, the mayor, clerk, and a part of the councilmen of said city, entered into a conspiracy to defraud said city, and in pursuance of said conspiracy caused said ordinance and the contract to be made in such hasty, irregular and unlawful manner that they were not binding on the city; that there was nothing due from said city for hydrant rental under said alleged contract or ordinance, and that no claim for the alleged hydrant rental had been presented to the council in the manner required by law.

It was not alleged in said complaint nor proven upon the trial that any interest on any of said bonds or coupons was then unpaid; nor that any default had been made in the payment of any of the interest or principal thereof. No adequate reason is given why the appellee, as trustee for the bondholders, should bring an action instead of the water company. The complaint goes no further than to allege the execution of the contract between the water company and the city; the construction of the works; the furnishing of water to the city; the city's failure to pay hydrant rental, and the execution and sale by the water company of bonds and coupons, and the execution by the water company of a trust deed.

Upon the trial, it was proven that the alleged city ordinance was not passed at any regular meeting of the city council, nor at any other lawful meeting of the coun-

cil, and that no action of the city council of Clay Center authorizing the alleged contract with the water company, was had at any such meeting.

The sole provision of the Kansas statutes bearing upon the question of the validity of these meetings, is Section 20, of Chapter 100 of the Laws of 1872, as follows:

"SEC. 20. Regular meetings of the council shall be held at such times, not less than once in each month, as shall be prescribed by ordinance. Special meetings may be called by the mayor, or acting mayor, on the written request of any three members of the council, specifying the object and purpose of such meeting, which request shall be read at the meeting, and entered at length on the journal. In all cases, it shall require a majority of the councilmen-elect to constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as the council by ordinance may have previously prescribed."

The proceedings of the meeting upon which rest the passage of the ordinance and the authorizing of the contract in question, are copied on pages 128 and 129 of the Record of this case under dates of January 8, 1884, and June 23, 1884.

Not only these minutes, but the oral testimony of the councilmen, show that no request was made by members of the council for the calling of either of these meetings.

The only subsequent meetings that can be claimed to have any bearing towards recognizing or ratifying said alleged ordinance or contract, are shown by the clerk's minutes copied in the Record, on page 129, under date July 7, 1884; on page 130, under date November 18,

1884; on page 131, under date April 17, 1885; on page 132, under date May 28, 1885; on page 133 and 134, under date September 1, 1885; on pages 134 to 138, under date September 3, 1885; on page 138, under date January 5, 1886, and on page 138, under date July 13, 1886.

The said proceedings of July 7, 1884, and April 17, 1885, were at meetings which were illegal, because they were called without any request of councilmen. The said proceeding of November 18, 1884, was illegal and void as against the city, because it was nothing but an attempt to amend an ordinance by simple resolution. Further, it is not shown that this proceeding was at any lawful meeting of the council; it being stated to be at an adjourned meeting of a meeting not stated to be a regular or duly called meeting. The said proceedings of May 28, 1884, were ineffectual, because they were at a meeting which had no other semblance of regularity or validity than the presence of the mayor, city clerk and four councilmen at a place not stated. The proceedings of September 3, 1885, and July 13, 1886, are not shown to have been at any regular meeting. The minutes say simply that the council met pursuant to adjournment, but fail to indicate when or where such adjournment was had.

The only proceedings relating to the alleged contract or to the water works question subsequent to the date of the alleged contract which were had at any meeting of the city council appearing to be regular or valid, were had on September 1, 1885, and January 5, 1886. At the former of these two meetings, a notice from the appellee

was ordered to be spread on the minutes, and at the latter meeting a city warrant for $1,700 for hydrant rental was ordered to be issued to the appellee.

It was agreed upon the trial (p. 139) that the proceedings above referred to were all the proceedings appertaining to the matters in question.

It was also shown on the trial, that during the construction of the water works the mayor was the owner of $10,000 of stock in the water company (pp. 68, 69); that the city clerk was also a stockholder in the water company (p. 66); that the president of the council then held $5,000 of stock in the water company (pp. 61, 62), and that at the time of the trial of this case in the circuit court, the said city clerk was president of the water company, and the said president of the council was superintendent of the water company (p. 61).

It was also shown on the trial that the alleged meetings of the council at which the alleged ordinance was passed and the alleged contract was authorized, were hastily called in the afternoon of the days on which they were held, and that they were held outside of the council room (pp. 55, 56, 57, 74, 75).

It was also shown on the trial, by the city records (pp. 119, 120) and by the agreed facts (p. 139), that there was a change in city officers in 1885, by which the mayor, clerk and some of the councilmen who made or attempted to make the alleged ordinance and contract, were succeeded by other men, and that in 1886 such further changes occurred that neither the mayor, clerk, nor any of the councilmen in office in 1884 remained in office; and it is further shown (p. 122) that on Decem-

ber 7, 1886, the then city government, as a result of investigations made by and through its committee on water works, discovered and became satisfied that said alleged contract was "illegal, void and of no force whatever," and from that time the city did not recognize it as a contract in any manner whatever.

The questions involved in this case may be briefly stated as follows:

1. Was the alleged city ordinance a valid ordinance of said city?

2. Was the alleged contract so authorized and executed as to be binding upon said city from and after the date thereof?

3. Is the city now estopped from denying the validity of said ordinance or said contract?

4. Can the appellee, as trustee for the bondholders, recover hydrant rental from the city until it has been alleged and shown that there has been a default in the payment of principal or interest of the bonds issued by the water company?

All these questions were raised by the argument and exceptions upon the final hearing of the case in the circuit court.

In order to uphold the decision of the circuit court in this case, it must be held either that the alleged ordinance and contract were originally valid, or else that, conceding their original invalidity, they had become valid by subsequent ratification or acquiescence on the part of the city.

That the ordinance was originally invalid can hardly be questioned in view of the Kansas statutes and the decisions of the Kansas Supreme Court. The decision in *The Paola & Fall River Rwy. Co., v. The Commissioners of Anderson County*, 16 Kans. 302, disposes of the question as far as the State courts can settle it. In that case, the action of the county commissioners authorizing a subscription to the capital stock of a railway company was held to be invalid, because such action was at a special session at which two only of the three members were present, and such session was not convened as required by law. The Kansas statute on that subject in force at that time was Section 13, of Chapter 25 of the General Statutes of 1868, as amended by Chapter 74 of Laws of 1873, making it read as follows:

"SEC. 13. The board of county commissioners shall meet in regular sessions at the county seat of the county on the first Monday of January, and the first Monday after the first Tuesday of April, and the first Mondays of July and October in each year, and in special session on the call of the chairman, at the request of two members of the board, as often as the interest of the county may demand."

It will be noticed that the request for a special session of a county board was not required to be in writing, nor to state the object of the session, nor to be read at the meeting, nor to be entered upon the journal of the proceedings; all of which steps were explicitly required for the convening of a city council, as shown by the section of statute heretofore quoted. Yet, in the case cited, the Kansas Supreme Court, in its syllabus of its decision, says:

"1. The powers of a county are vested in a board of

commissioners as a corporate entity, and not in the commissioners separately and as individual officers.

"2. The county board, before it can act, must be convened in legal session, either regular, adjourned, or special; and a casual meeting of a majority of the commissioners does not create a legal session.

"3. A special session may be convened upon the call of the chairman at the request of two members; but personal notice of such call must be served, if practicable, upon every member of the board."

In the opinion Judge Brewer says: "It must be remembered that the powers of the county are not vested in three or more commissioners as such, but in a single board. Two commissioners casually meeting have no power to act for the county. There must be a session of the 'board.' This single entity 'board' alone can, by its acts, bind the county. And it exists only when legally convened."

This decision has been directly referred to and affirmed in *Aikman v. School District*, 27 Kan. 129, and *Mincer v. School District*, 27 Kan. 253. The following cases in other States are of like effect:

Schumm v. Seymour, 24 N. J. Eq. 143.
Dey v. Jersey City, 10 N. J. Eq. 412.
Baltimore v. Poultney, 25 Md. 18.
Strong v. District of Columbia, 4 Mackey, 242.
McCartle v. Bates, 29 O. St. 419.

In the case at bar, not a single requirement as to manner of convening a special session of the city council was complied with. As no decision or opinion in this case, in writing, was made in the circuit court, the Record does not show the grounds upon which the decision we

complain of was based; but it is a fact, which we suppose will be conceded, that the learned judge of the circuit court was of opinion that the ordinance and contract were originally invalid, but that they became binding upon the city by subsequent acquiescence and ratification.

We think that a more deliberate consideration and examination than the trial court had an opportunity to give to the testimony, and particularly a more careful, logical and systematic analysis and presentation than the counsel for appellant made of the evidence in the hurry of the trial term, will make it apparent that the city ought not, in equity or at law, to be held liable to the appellee.

There is no question of innocent purchaser in this case. The bonds described in this complaint are not the bonds of the city. There is no contract alleged by which the city can be claimed to have guaranteed the payment of any portion of the principal or interest of the bonds. By the terms of the alleged ordinance, contract, bonds and trust deed, the sole obligation of the city to the bondholders and their trustee was to withhold from the water company and to turn over to the bondholders and their trustee, the hydrant rental which should become due from the city to the water company not to exceed the interest on the bonds. There is nothing in the whole alleged arrangement which, as against the city, would tend to give the bondholders or the trustee any greater rights than the water company would have had if no bonds had been issued. We do not suppose that it will be contended that if the water company

had failed to operate the water works or to furnish water to the city for fire or other purposes, the trustee of the bondholders could still recover hydrant rental from the city.

We call attention to this feature of the case because it distinguishes this case from all the cases relied upon by the appellee as precedents, to sustain the decree we complain of.

It seems to us that the city cannot, by the acquiescence or ratification claimed, be estopped as against the trustee unless it is estopped as against the water company. In this respect, the former has succeeded and can succeed to no more than the rights of the latter. By the terms of the alleged contracts, the right of the trustee to recover from the city and the amount of such recovery, has depended and must depend on the conduct of the water company. A failure by the latter to earn the hydrant rental defeats the trustee's right of recovery.

There are several reasons why the acts relied upon by the appellee failed to constitute a ratification and to create an estoppel against the city.

The resolutions to extend the time for completing the water works of date July 7, 1884, and November 18, 1884, were attempts to amend an ordinance by simple resolution, and were adopted at meetings of councilmen as irregular and illegal as the meeting at which the alleged ordinance was passed. The resolution locating hydrants, of date April 17, 1885, and the resolutions as to the number and rental of hydrants of the foregoing dates, were all passed at meetings which were not lawfully convened. The same can be said of the resolution

accepting the water works, of date May 28, 1885. The rule upon this subject is stated in volume 15 of Am. and Eng. Enc. of Law, p. 1103, as follows:

"If a contract of a municipal corporation be invalid when made for a failure to comply with the statutory requirements, its subsequent ratification by the corporation requires the observance of the same formalities and provisions necessary to be complied with in the making of a valid contract."

A considerable number of cases are there cited in support of this proposition.

But the most far-reaching reason why the city was not estopped, is that all the foregoing acts and proceedings and the subsequent payment of hydrant rental for 1885 and the first half of 1886, were done and had by the city officers who in conjunction with J. E. Bonebrake and the water company, unlawfully and corruptly organized and carried out the water works scheme, and by other city officers who were misled and deceived as to the city's obligations. It appears from the Record (p. 122), that on December 7, 1886, the mayor and city council (composed of successors of the wrong doers) learned from the report of its committee on water works, that the city was under no legal obligation by reason of the alleged contract. From that time and, in fact, from the preceding July, there was no recognition of the alleged contract on the part of the city. From that December 7, which so far as the evidence in this case shows, should be held to be the first discovery, by the city, of the illegality and invalidity of the contract, the city government has been upon record as refusing to recognize it in any manner whatever.

It does not appear in evidence at just what date the city officers who were not in the water works scheme first learned that the mayor, clerk and president of the council were stockholders in the water company, but it is justly to be inferred that it was at the time of the investigation and report made by the water works committee in the latter part of 1886. There can be no duty to speak if the party has no knowledge of his rights. *Bringard v. Stellwagen*, 41 Mich. 54.

It does appear from the evidence, that Bonebrake was present at all the alleged proceedings of the city council which are claimed to constitute the passage of the alleged ordinance and the authorizing of the alleged contract (pp. 56, 58, 60, 66, 81, 82). It appears, by the oral testimony generally, that Bonebrake lived at a neighboring town, and that whenever he desired to have any step taken about the proposed water works, he went to Clay Center on the early evening train and got the mayor to convene the council so that the desired proceedings could be had in time for him to return home that night.

In volume 15 of Am. and Eng. Enc. of Law 1086 a rule established and supported by almost innumerable cases there cited, is stated as follows:

"The law is well settled that when the mode of pro-
"ceeding in respect to municipal contracts is prescribed
"by law or in the charter of the corporation, such
"mode must be strictly pursued by the corporation in
"relation to the awarding and making of contracts and
"in their subsequent ratification. If this is not done, no
"liability is incurred. A party dealing with a municipal
"body is bound to see to it that all the mandatory pro-
"visions of the law are complied with, and if he shall

"neglect such precaution he becomes a mere volunteer "and must suffer the consequences."

It also appears, by direct testimony, that the water company which became Bonebrake's legal successor, was organized in December, 1884, and that the city clerk and the president of the council then became members of it (pp. 66, 61, 62), and that the mayor by, in and through the name and instrumentality of a third party, secretly took $10,000 stock in the water company (pp. 68, 69). The exact date of the taking of this stock does not appear, but it was while he was mayor, and it is fairly to be presumed that it was in December, 1884, at the organization of the company. His own testimony (p. 86) concerning this stock, is crooked, evasive and in important respects, incredible.

So far as shown by all the testimony in this case, the sole beneficiaries of the alleged contract are said mayor (C. E. Gifford), said clerk (A. A. Goddard), said president of the council (Ira J. Flood), and said J. E. Bonebrake. It is probable that there are other parties in interest, but these men have all the time constituted the chief managers of the water works scheme, and with one D. A. Valentine, have been the chief managers and officers of the water company. All of them except Valentine, are shown to have all the time known the facts which make the alleged contract unlawful and invalid. These are the men who must have been imposed upon or misled by the acts and acquiescence of the city in order to create an estoppel in this case. These are the men who, in a practical and business sense, represent and are the water company and constitute "said

John E. Bonebrake, his successors and assigns," referred to in the alleged ordinance and contract. It is well settled that no estoppel can arise unless the party relying and acting upon a declaration is ignorant of the actual facts. In the case of *St. Louis Smelting and Refining Co., v. Green* (4 McCrary, 232, 239), Judge McCrary says: "Now, one of the familiar rules with regard to estoppel which we all understand perfectly, is this, that the party to whom the representations are made must be ignorant of the truth of the matter about which they are made. If he knows the fact and chooses to take his chances, the other party is not estopped."

This rule applies also where mere acquiescence and silence constitute the representations relied on.

In the case of *Steele v. Smelting Co.*, (106 U. S. 447) it was applied where one person made improvements on another's land, knowing it to be such.

The rule stated by Justice McCrary has been applied, under various circumstances, in the following cases:

Williams v. Wadsworth, 51 Conn. 277.

Lash v. Rendell, 72 Ind. 475.

Powell v. Rodgers, 105 Ill. 318.

Shellock v. Gilbert, 23 Minn. 373.

Robbins v. Potter, 98 Mass. 532.

Phinney v. Johnson, 13 S. C. 25.

Kingman v. Graham, 51 Wis. 232.

It seems to us, under the evidence in this case, never to have been possible for the city to have misled "said Bonebrake, his successors and assigns" concerning the facts upon which the alleged contract depended for its validity. Of those facts, they all the time had a more

"with a full account of the items, and verified by the "oath of the claimant or his agent that the same is cor- "rect, reasonable and just; and no claim or demand shall "be audited or allowed unless presented and verified as "provided for in this section."

If a claim had been made and presented in accordance with this provision of statute, the city would doubtless have allowed and paid the value of what it had received.

The controversy in this case is concerning the enforcement of an alleged contract for the payment of about $4,000 per annum for a period of twenty years from January 8, 1884. The payment of the two semi-annual installments alleged to be due at the commencement of this action is but a small part of the controversy. The chief relief prayed for in the complaint and granted by the circuit court is the establishment of the alleged contract as a valid obligation for the payment to the appellee of about $74,000 in thirty-seven semi-annual payments. The first and most important part of the decree (p. 144) is as follows:

"It is further ordered, adjudged and decreed that "said ordinance and contract do make and constitute a "lawful, valid and binding obligation on the part of the "city of Clay Center to pay said hydrant rental to said "complainant in trust for the benefit of said bondholders; "that said ordinance is a valid and lawful ordinance and "the contract made with said John E. Bonebrake and "his assigns in pursuance of said ordinance is a lawful "and binding contract and made with due and proper "authority from said city."

The city government of Clay Center is not seeking to repudiate any just obligation. It is not attempting to

obtain something for nothing. It is willing to pay the water company or its assignee a fair price for what it has received, whether that price be greater or less than the alleged semi-annual rental sued for in this case; but it desires that such price be based upon the value of what it has obtained instead of being arbitrarily fixed by a corrupt and invalid contract.

It intends to pay for all it gets hereafter, and it intends to treat the water company and its assignees justly and fairly. For the future, it desires to make such arrangements for water, as justice and the public needs require.

It does not follow nor is it rendered probable by anything shown in this case that the bondholders will lose anything if the alleged ordinance and contract are held to be invalid. No proof is made that the bondholders are any other than Gifford, Goddard, Flood and Bonebrake, nor even that there has been any actual sale of any of the bonds to anybody. No showing whatever is made as to the value of the water works plant, nor of the effect upon such value of either the validity or invalidity of the alleged contract. If Gifford, Goddard, Flood and Bonebrake have paid into the treasury of the water company on their stock even the ten per cent testified to, and have put that money and the proceeds of the bonds into the construction of the water works, it may be reasonably concluded that the water works are ample security for the payment of the bonds, whether the amount of hydrant rental to be paid by the city is already fixed or not. But if these men did actually sell the bonds, and then, instead of putting the money into the water works, they have fraudulently divided it

among themselves, there is a probability that somebody has been victimized, but until the victim appears under his true name and is shown to have clean hands, the court is not called upon to save him by the further sacrifice of an earlier victim.

J. B. JOHNSON,
JOHN MARTIN,
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HENRY KEELER,
Of Counsel.

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SUPREME COURT.

OF THE UNITED STATES.

CITY OF CLAY CENTER,
Appellant,

vs.

THE FARMERS, LOAN AND TRUST COMPANY.
Appellee.

CASE No. 13,507.

TERM No. 339.

BRIEF FOR APPELLEE.

W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
HERBERT B. TURNER,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1891.

TERM NUMBER 339.

CITY OF CLAY CENTER,
Appellant,

vs.

THE FARMERS' LOAN AND TRUST COMPANY,
Appellee.

Brief for Appellee, The Farmers' Loan and Trust Company.

A brief statement of the nature of this suit and the issues involved is as follows:

On the 24th day of January, 1884, the city of Clay Center, Kansas, entered into a contract with one John E. Bonebrake, in pursuance of an ordinance previously passed, to provide for a system of waterworks and to supply water to the city of Clay Center and the inhabitants thereof. This ordinance was embodied in and became a part of the contract whereby the city covenanted with said John E. Bonebrake and his assigns to grant certain franchises for supplying the inhabitants

of the city with water for domestic uses and the city of Clay Center with water for fire protection. Definite specifications were fixed for the construction of these waterworks in the ordinance, and they were subject to the acceptance of the city. John E. Bonebrake assigned his rights to a corporation formed for the purpose of completing the waterworks, known as the Clay Center Water Company, and the same were completed and accepted by the city.

The main consideration for the expenditure of money on the part of Bonebrake and his assigns in the construction of the works for a public and private supply of water to Clay Center, was an agreement in said ordinance on the part of the city to pay an annual rent for a certain number of fire hydrants. Section 9 of the ordinance embodied in the contract, is as follows:

> "It is hereby agreed by and between the said John E. Bonebrake, his successors and assigns, and the city of Clay Center, that in the event it be deemed necessary in the construction or extension of said waterworks, to issue first mortgage bonds upon the said waterworks property or extensions, either or all, that so much of the hydrant rental to be paid by the city of Clay Center under the provisions of this ordinance as will fully pay the interest on said bonds shall be paid the holders of such bonds by their Trustee semi-annually on the first days of January and July in each year until such bonds are paid, and that the balance of the hydrant rental which the city of Clay Center agrees to pay shall be paid to John E. Bonebrake, his successors or assigns.
>
> "It being understood that the hydrant rental which the city of Clay Center agrees to pay to the said John E. Bonebrake, his successors and assigns, for fire protection, or so much of said amount as shall be necessary to pay the interest on such bonds, shall be set aside and paid to the Trustee of such bonds, and by him used exclusively and only for the payment of interest upon such bonds when and

so long as the same shall become due and payable.

"When such bonds are fully paid and canceled, then the hydrant rental due from the city shall be paid in full to John E. Bonebrake, his successors and assigns, but in no event shall the city of Clay Center pay to said Trustee for such interest a sum greater than the amount agreed to be paid to John E. Bronebrake, his successors and assigns; and provided further that the said city shall in no case become liable for any misappropriation of any money paid to said Trustee. If there be no such Trustee, such payment may be made to the owners of said bonds."

THE APPEAL SHOULD BE DISMISSED.

This suit was brought by the Trustee, The Farmers' Loan and Trust Company, to establish and enforce the liability of the city in respect to two instalments of hydrant rental falling due and refused to be paid by the city, amounting to the sum of $4,042.65. Upon the hearing before the Circuit Judge the Court found for the complainant and entered a decree against the city of Clay Center for the sum of $4,024.65. This decree was rendered on the 7th day of August, 1888, and entered on the records of the Court on that day. At the time of the rendition of the decree an appeal to this Court was prayed for by the defendant and the Court allowed said appeal, and supersedeas bond in the sum of $8,000 was fixed by the Court. The bond was subsequently executed, but the appellant failed to comply with Rule IX of this Court and the record of said appeal was not filed in this Court within six days after the first day of the following Term.

The appellee consequently filed a record and caused the same to be printed, and moved the Court to dismiss the appeal for the non-compliance by the appellant with

Rule IX of this Court, and also for the additional reason that the record disclosed the fact to be that the matter in dispute, exclusive of costs, did not exceed the sum of $5,000 and this Court had no jurisdiction to entertain an appeal. A proper motion was filed asking for a dismissal of the appeal upon these grounds, but for some reason the motion was continued by the Court, to be submitted upon the record when the case should be called for hearing.

For some reason the counsel for the appellant has ignored the pendency of this motion and has not referred to it in the Brief furnished the counsel for the appellee. We desire to call the Court's attention to this motion and to urge that the appeal should be dismissed upon both of the grounds stated in the motion. The first ground is purely a technical one, and the appellant subsequently, we understand, filed a record which appears to be a complete record of the proceedings in the Court below; but from an examination of the same in connection with the Brief of appellant's counsel, it appears that the record filed by the appellant, and upon which the case is to be submitted to the Court, omits the oral testimony taken at the hearing upon the issue involved. The counsel for the appellant refer to this oral testimony on pages 4 and 14 of their Brief, but the fact exists that the record does not contain this testimony. This we urge as an additional reason why the Court should dismiss the appeal and affirm the decree below.

But it clearly appears from the record that there is not a sufficient amount involved to entitle the appellant to an appeal to this Court. The record discloses that the Clay Center Water Company, for the purpose of borrowing money to complete the construction of its waterworks, issued sixty bonds, of $1,000 each, secured by a trust deed of the franchises and property of the Water Company; that the Farmers' Loan and Trust

Company, as the Trustee named in said trust deed, accepted the trust, and certified and issued the bonds. It further appears on page 133 of the record, and under the proceedings of the City Council of the date of September 1st, 1885, that the Trustee was recognized by the Mayor and Council of the city of Clay Centre, first by receiving and placing on file a notification of the appointment of the Trustee, and by recommending a levy of eight mills to pay hydrant rental, and also subsequently by the payment of certain instalments of the hydrant rental under the terms of the contract. But the city failed to pay the instalments of hydrant rental falling due respectively on the first days of January and July of the year 1887, whereupon the Trustee brought this suit to establish and enforce the provisions of the contract, and to collect this hydrant rental.

At the time the suit was commenced, it appears by the terms of the contract that no further or additional sum was due from the city to the Trustee or could be claimed by the Trustee, and it is a fact apparent that the hydrant rental had only a potential existence until it was earned by the Water Company by a continuing supply of water under the terms of the contract and in pursuance of its covenants and agreements in that behalf. The only element of implied liability on the part of the city to bondholders or the Trustee, the Farmers' Loan and Trust Company, in their behalf, was by virtue of the granting clause of the trust deed, which assigned and transferred to the bondholders in express terms the right to collect the hydrant rental as part of the security for the interest upon the bonds. It was inadequate at the time of the commencement of this suit to wholly meet that demand, and the residue of interest was collectible from the Water Company. We urge, therefore, that the record discloses that the matter in dispute in this case does not exceed, exclusive of costs, the

amount of $4,042.65, being the amount awarded under the terms of the decree.

It is urged by the appellant that this is not true, for the reason that the decree affirms the validity of the contract between the city and the Trustee, which extends over a period of time and validates the contract and establishes a liability against the city greatly in excess of $5,000. While it is true that the city may subsequently be estopped, provided the decree in this case is affirmed, by the record in this suit, nevertheless the amount in litigation in this particular suit is less than $5,000. We think the exact point has been passed upon by this Court in numerous cases, and we especially call the Court's attention to the case of *Elgin* vs. *Marshall*, 106 U. S., 578. In that case the contention was that, although the judgment, being upon coupons detached from municipal bonds, was less than the jurisdictional amount, it was conclusive as an estoppel against the validity of the bonds and other coupons held by the plaintiff considerably in excess of $5,000, and hence the jurisdictional amount was in dispute. It seems to us that there is a perfect analogy between that case and this. It cannot be urged that the bonds given by the Water Company were in controversy in this suit. Neither was the franchise. And even if the latter might be said to be incidentally in controversy, the value is not shown by the record. The fruits of the hydrant rental had no existence for any purpose until they were earned, and *non constat* the hydrant rental was to last as long as the franchises. The Water Company might fail in its duty to furnish the supply of water required under the terms of the contract, and therefore would be entitled to recover no hydrant rental from the city. Such as the Water Company had earned at the time the bill was filed, however, the Trustee was entitled to receive and it might go into

Court and collect, as it did in this case, under the terms of the contract made between the City and the Trustee. But no cause of action existed or could exist either by the Water Company or by the Trustee except upon accrued rentals. That being true, the matter in dispute is necessarily confined to the hydrant rentals sued for. It is true that the city denied the validity of this contract or the ordinance, but the record shows that its denial was limited to the question of the authority of the municipality to pass the ordinance or to execute the contract because the ordinance was passed at a special meeting of the Council, and the Mayor was authorized to sign the contract at a similar meeting, which meeting was not called in strict compliance to the provisions of the statute. The bill pleads certain waivers and ratifications upon the part of the city, and the Court therefore held the contract binding upon the city, and gave the Trustee a money decree for what was asked and for no more than was asked. The Trustee was not entitled to, nor could it under any circumstances receive, more than the hydrant rental mentioned in the bill. The case of *Ross, Adm'r.* vs. *Prentice*, 3 How., 771, is also in point. Also *Gray* vs. *Blanchard*, 97 U. S., 564; *Banking Association* vs. *Insurance Association*, 102 U. S., 121; and the case therein cited, approved by the Court.

In the case of *Hilton* vs. *Dickinson*, 108 U. S., 165, which is a case reviewing this whole subject, this Court holds that on appeal by defendant the sum of the judgment against him governs the jurisdiction when no affirmative relief is asked. In this case no cross-bill was filed nor any issue framed beyond that which was necessary to a proper resistance to the money demand sought to be recovered by and which was the exclusive purpose of the suit. The principle decided in *Elgin* vs. *Marshall* and *Hilton* vs. *Dickinson*, has been repeatedly re-

affirmed in recent decisions in this Court in the following cases:

Opelika City vs. *Daniel*, 109 U. S., 108.
Henderson vs. *Wadsworth*, 115 U. S., 276.
Hassall vs. *Wilcox*, 115 U. S., 598.
Bowman vs. *Chicago & Northwestern R. R.*, 115 U. S., 611.
Bruce vs. *Manchester & Keene R. R.*, 117 U. S., 514.
New York Elevated R. R. vs. *Fifth National Bank*, 118 U. S., 608.
Gibson vs. *Shufeldt*, 122 U. S., 27.
Zeckendorf vs. *Johnson*, 123 U. S., 617.
Whitsitt vs. *Union Depot Co.*, 122 U. S., 363.
United States vs. *Hill*, 123 U. S., 681.

We respectfully urge that the same principle should be held in this case and the appeal dismissed for the reason that the appellant failed to comply with Rule IX of this Court.

That the record does not contain all the testimony upon which the case was submitted to the Circuit Court.

And for the reason that the record discloses that the amount of $5,000 is not in controversy in this suit.

Argument on the Merits.

But if the Court should desire to examine into the merits of the controversy, then we respectfully ask that the decree of the Circuit Court be affirmed, for the reason that if there existed any irregularity in the passage of the ordinance, the record discloses that the appellant has repeatedly, during and since the execution of the contract by the Water Company, by innumerable public acts and admissions, duly ratified and confirmed the

ordinance, and has waived and cured any irregularity in the passage and adoption of said ordinances by its admissions and acts of ratification by its Council, the payment of hydrant rentals and numerous other proceedings as disclosed by the record. We, however, contend that there was a valid and binding obligation made between the city and the Water Company for the benefit of the holders of the bonds by the passage of the ordinance disclosed in the record. Section 61, Chapter 19 of the Compiled Laws of the State of Kansas for the year 1885, provides that the Council may make regulations to provide the city with water. Sections 32 and 33, Chapter 19, enumerate the authority and powers of cities of the second class to enact ordinances. Section 31 of the same Chapter provides as follows:

> "The Mayor and Council of each city governed by this Act shall have the care, management and control of the city and its franchises, and shall have power to enact, ordain, alter, modify or repeal any and all ordinances not repugnant to the Constitution and laws of this State, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of inhabitants thereof, *and such other ordinances, rules and regulations* as may be necessary to carry such power into effect."

It therefore appears by the foregoing statement that a valid contract for supplying a city of the second class (to which class the appellant belongs) with water, can be made by resolutions of the Council, and need not be by ordinance.

Section 20 of Chapter 19 provides as follows:

> "Regular meetings of the Council shall be held

at such times, not less than once in each month, as shall be prescribed by ordinance. Special meetings may be called by the Mayor, or acting Mayor, on the written request of any three members of the Council specifying the object and purpose of such meeting, which request shall be read at the meeting and entered as at length on the journal. In all cases it shall require a majority of the Councilmen-elect to constitute a quorum to do business, but a smaller number may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as the Council by ordinance may previously have prescribed."

Section 67 of Chapter 19 provides also :

"For any purpose or purposes mentioned in the preceding section, the Council shall have the power to enact and make all necessary ordinances, rules and regulations," &c., &c.

It therefore appears that nowhere is a city of the second class required to pass an ordinance to provide the city with water, but may make or authorize a contract for such provision by resolution. Regulations and rules are referred to in the statute as separate and distinct from ordinances, and if the Legislature had intended that an ordinance to provide for a supply of water should be necessary, it would have been clearly expressed in the statute. The ordinance, if effectual, is effectual only in so far as it grants a franchise to the Water Company. The provisions in reference to the City's supply of water might not have been included in the ordinance, but might have been adopted by a resolution outside of the ordinance. It certainly must follow that a valid contract for supplying the city with water might have been passed by resolution. But in this case no proceed-

ings have ever been begun to oust the Clay Center Water Company in the franchises granted by the City, and we contend that such ordinance cannot be collaterally attacked, but that it could only be reached by a direct proceeding brought by the City against the Water Company to deprive it of its franchise.

It is contended by the appellant that owing to certain irregularities in the calling of the meeting of the Council at which the ordinance was passed, the ordinance was invalid and that the Water Company derived no rights under its terms, although the Water Company went on and acted under it and completed its plant in strict conformity with the provisions of the ordinance. It was stipulated by counsel upon the hearing, as is disclosed on page 142 of the record, as follows:

> "It is further stipulated and agreed that the waterworks in the City of Clay Center were in all respects complete and finished in accordance with the terms of the alleged contract, and that from the day of their completion up to the present time, as modified from time to time by resolution of the Council; that from the day of the completion of said waterworks up to the present time, a full supply of water for domestic and sanitary purposes and for fire protection has been furnished to said city and its inhabitants; that the City of Clay Center owns fire apparatus and has a building occupied as a fire department by a volunteer fire company, a chief of which is appointed by the city, and the members of which company are furnished free accommodations for sleeping therein; that the City of Clay Center has also a pipe from the main for its exclusive use into the fire department building, and has constantly used said water in the said buildings, and the Street Commissioner of said city has

used said water for flushing gutters and culverts, all free under the terms of said alleged contract, and is now using it.

"It was further stipulated and agreed that since the 10th day of July, 1886, the City has refused to pay any money for hydrant rental under the terms of said alleged contract, and has paid no money for such hydrant rental or for any use made by it of said water; that the City has used on all necessary occasions said water and said hydrants for the extinguishment of fires since the construction and completion of said works up to the present time, and that said water is now ready and furnished for their continued use: that the said City erected drinking fountains in the City of Clay Center, to which water was supplied for use of the public without cost to the public or to said City; that the water has been furnished by said Water Company in two of the public school buildings of said City, and furnished free at the request of the Board of Education of said City."

And it further appears from the record that from the completion of the works up to January 6th, the appellant complied with the terms of the contract and paid to the Trustee the hydrant rental falling due under the provisions of the ordinance, and the appellant now seriously contends that owing to slight irregularities in the holding of this meeting at which the ordinance was passed, it has the legal right to repudiate its contract and to be relieved from any liability under its terms, although accepting the full benefits of it as set forth above. We urge, however, that the calling of the meeting at which the ordinance was passed was in conformity with the spirit of the statute. The object of the law is plain upon its face. It is to secure notice

to the members of the City Council of the object of the meeting and to make a permanent record of that fact. Whether the request of the members of the council to call the meeting was verbal or written is of small moment if the true and essential particulars of the proposed meeting were noticed to the Council and they were present and participated. See *McGrath* vs. *City of Newton*, 29 Kans., 369.

The same provision of law is to be found in the act relating to cities of the third class. See Section 16, Chapter 19 *a*, an act relating to cities of the third class. The City of Clay Center was in existence as a city of the third class for many years before it attained the requisite population to become a city of the second class. During the entire period of its existence as a city of the third class and as a city of the second class down to the time that the City proposed to repudiate this contract, the principle business of the City was transacted at special meetings called exactly as the meetings were called in which the ordinance was passed and the contract let in this case. The record discloses in the proceedings of the Council of the appellant that during the five years immediately preceding the passage of this ordinance and the letting of this contract, not a single special meeting was called in strict compliance with the statute, but innumerable special meetings were held at which ordinances were passed, contracts let, bills allowed and money appropriated, upon exactly similiar notices to the one in which this ordinance was passed. If the city has power to repudiate its contracts by reason of slight irregularities in the calling of the meeting in which its ordinance was passed in this case, then the City of Clay Center would have power to annul, avoid and hold for naught nearly all its official acts and contracts from the time of its creation as a city of the second class down to within a short period before the commencement of this suit. It

appears by the testimony covered by the stipulation herein that the city passed the ordinance conferring the rights upon the Water Company at a special meeting; that it awarded and authorized the contract to be made at a special meeting, but that afterwards, at a regular meeting, the minutes of the special and regular meetings of the prior month were read and approved, February 6th, 1884.

That subsequently, at both regular and special meetings, resolutions were passed extending the time for the performance of the contract and the fixing and locating of mains, and at a meeting held on the 28th day of May, 1885, the Waterworks were accepted by the city. At a regular meeting on the first of September, 1885, there was presented by the Waterworks Company, passed and ordered to be spread upon the minutes of the meeting, a certificate that the Farmers' Loan & Trust Company of New York City was the duly authorized Trustee for the Clay Center Waterworks Company of its bonds, and that all money due the Water Company from the City of Clay Center for hydrant rental was payable to the Trustee direct according to Section 9 of the contract between the City and the Water Company, and at the same meeting a levy of eight mills to pay hydrant rental was ordered by the City. See Record, page 133.

At a meeting of the 3d of September, 1885, a bill of $705.13 to the Farmers' Loan & Trust Company for hydrant rental was approved, and on motion was allowed and ordered to be paid and was subsequently paid. On January 5th, 1886, at a regular meeting of the City Council of the appellant, the following resolution was passed:

> "*Resolved*, that the Clerk be and is hereby instructed to issue a warrant on the treasury in the sum of seventeen hundred dollars in favor of the

Trustee of the bondholders of the Clay Center Water Company, in full payment for hydrant rental due January 1st, 1886."

And again on the 13th day of July, 1886, the hydrant rental, amounting to $1,725, was allowed and ordered paid and subsequently paid.

Upon the foregoing facts, which are not disputed, and after the city has reaped the full benefit of its contract and still continues to do so, we submit that in this suit, which is one of an equitable nature, brought by the Trustee for the benefit of the bondholders and in the performance of a trust recognized and created with the assent of the city, the Trustee is the equitable transferee of the hydrant rental and its rights as such have been recognized by the city, that no defence can be made to the bill, except one based upon the following propositions: First, the want of authority; second, a total failure to exercise authority; third, a total want of consideration.

Now the authority to make a contract of this sort is to be found in the statute. The Mayor and Council are clothed with plenary power in this behalf. They may not issue bonds, to be sure, without the assent of the people; but they can make a contract looking to a water supply for the citizens and the city. The authority to make such a contract, as we understand it, is not questioned. The validity of the consideration is questioned, but no testimony was taken in that behalf and none is disclosed by the record, and the contract set forth appears to be a just and even a liberal one to the city. We apprehend the Court will take judicial notice that the City of Clay Center, being a city of the second class under the laws of the State of Kansas, is a very small community within which a corpo-

ration may erect waterworks and hope to get any or a reasonable return. The number of public hydrants is of course extremely limited and the future demand for their extention doubtful, and therefore the present charge for them set forth in the ordinance must be considered extremely reasonable. Outside of the record, we might say in this behalf that the rule with reference to this is that the water mains shall return in rentals so much per mile. A part of the hydrants to be erected under this contract make returns in behalf of this particular item and return even below the minimum. The Clay Center Water Company, as appears from the record, were enabled to issue their bonds upon the faith of this hydrant rental, and this alone. Upon a failure to pay the same and the deduction of the amount of the rentals from their returns, the Water Company would necessarily be thrown into insolvency and the Trustee would be bound to foreclose the mortgage with the assurance of the payment of a large part of the interest gone, and the burden of recompensing bondholders and enabling the purchaser to perform the contract with the city thrown upon the citizens of the city.

It is presumable, also, that the rates for water rental, which the Court will find upon examination extremely reasonable, were based upon the assumption that the city would pay this hydrant rental.

Taking all these circumstances into view, the consideration for which the city agreed to pay hydrant rental has been fully and amply given. But as there is no question on that behalf on the part of the city, it need not be considered.

The pivotal questions, then, are:

First.—Has the authority conferred by law been duly

or properly exercised by the agents of the city so as to make the contract in that behalf regular and valid?

Second.—If irregularity in the exercise of that authority exist, is it one which goes to the essence of the power, or is it merely an informality of which the Court will not take cognizance?

Third.—But if either, has the city by recognition and acquiescence on the part of the proper authorities, validated the act which has been done in behalf of the city by the Mayor and Council.

We have already said that we think the essential requirement of the law has been fully accomplished by a notification to the members of the City Council of the purpose of the meeting, and the spreading of this notification upon the records of the Council. The law directs that it shall be upon the written request of three members of the Council, stating the purpose and object, which shall be read at the meeting and spread upon the journal.

The essential object of the notice is, as we take it, to apprise all the members of the Council what the purpose of the special meeting is, and that additional publicity of that fact shall be made by including the same in the records of the meeting, so that nothing not germane to the call shall be passed or adopted. There can be no other object in the statute.

In response to the various notifications of the calling of special meetings relating to this waterworks matter at one time or another every member of the Council was present and participated, and their proceedings were in every respect harmonious and uniform, and no business

was transacted at these meetings not included within the scope and purpose of the written call.

It would have been easy enough for the members of the Council, after assembling, to have prepared a written call, signed it and placed it upon the record, and though the statute seems to require a written request by three members for the calling of a special meeting, specifying the purpose, which shall be put upon the journal of the meeting, it seems to us that the purpose of the statute is effectuated and accompliished if the call that was made apprised the members of the real purpose of the special meeting, and was responded to by all the members, and the act that was done was uniformly acquiesced in by them.

The act sought to be done was one appertaining to the ordinary government of the city. In discussing the question of *ultra vires*, Judge Dillon makes a distinction between powers strictly municipal and powers extra-municipal. The passage of an ordinance submitting a proposition to vote aid to a railroad company building towards the city would be an extra-municipal power, as to the exercise of which the policy of the law would be strictly construed.

In the case of *Moore* v. *Mayor*, 73 N. Y., 238, it was sought to defeat a contract made with the city on the ground that the ordinance was not legally published.

> "The provision of the statute upon which the objection rests," says the Court, "is not a part of the section conferring general powers of legislation upon the common council, but is found later on in the statute, and in a section mainly, if not entirely, directory, regulating the formal mode of procedure, the sittings of the two branches of the Council, the keeping of the journals of their proceedings, etc. It is not a limitation or qualification of the general

powers granted. There is no enactment in or out of the section, that a failure, either literally or substantially, to comply with any of the regulations therein prescribed shall vitiate the proceedings, or that an ordinance for any of the purposes mentioned, passed without the prior publication called for, shall be void."

The Court further says:

"Individuals dealing with municipal authorities may, without incurring extra hazard, assume that acts of the general governing body within their general powers, which are published, represented and held out as valid, with invitations to individuals to enter into engagements and expend money and labor on the faith of them, are in fact as represented, and to deal upon the faith of such assumption, and the corporation having received the fruits of engagements entered into on the faith of such representations should be estopped from alleging a mere irregularity to avoid them."

And again the Court says:

"It is not allowable, however, for a municipal corporation to perpetrate a fraud upon those contracting with it upon the faith of its laws and ordinances, apparently valid and represented as such, by repudiating them upon the allegations of some technical and formal irregularity in their adoption, an omission of some collateral act, some formality prescribed by statute, not of the substance of the power or jurisdictional in its character."

This we take it to be universally the law. It is also a well-settled principle of law that where the authority to make a particular contract exists, and another contract is made beyond the authority of the corporation,

the substance of the contract within the power of the corporation will, after performance by the contractee, be held to be good notwithstanding that it is coupled with a condition which transcends the power of the corporation, and is unlawful, and this is held for the same reason that is expressed by the Court in *Moore* vs. *Mayor*, because it would be against conscience and justice to permit a corporation to plead its want of authority against an executed contract.

The case of *Hitchcock* vs. *Galveston*, 96 U. S., 341, is a case in point. In that case they say :

> " It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful."

We can see no difference in principle between the case of a city which fails to comply with a formal direction of the statute touching its own procedure, and a city which makes a contract the substance of which contains an unlawful element. In both cases the reason for the ruling is the same ; that on the face of it the city seems to be exercising a lawful authority in a lawful way, and on the security of such exercise parties contracting with it in good faith parted with their money and value, and which the city receives.

There is and can be no claim of a defect of power upon the part of the city in making such contract. That is clearly expressed in the statute. Now, therefore, if this power was defectively exercised, and such defect would have been fatal in a proceeding brought to set aside the contract, or by an immediate act of rescission on the part of the city, it can nevertheless in a

proper and lawful way ratify and affirm such defective exercise of authority. Of course, the rule is obligatory upon persons dealing with a city, to deal with it within the limitation of its express powers, but that refers to the substance of the power, and not to proceedings touching its exercise. No rule of law is more absolute than that municipalities may estop themselves against pleading a defective exercise of powers which they undoubtedly possess, and ratification is simply one of the forms of estoppel. The whole law of municipal bonds with relation to recitals is founded upon this principle. The cases are innumerable where every pre-essential and jurisdictional requirement of the law to the exercise of a particular power in this behalf has been violated or wholly omitted,and yet by asserting the contrary, upon a piece of negotiable paper, they have been precluded and estopped from setting up this primary defect of authority.

The authorities are also innumerable that where they have either not acted at all, or have acted defectively with reference to a matter concerning which they are clothed with power to act, they may, by their subsequent acts or omissions, so confirm and cure the original defective exercise of power as to place it beyond the power of the city to deny that it had lawfully acted.

Granted that the franchise of the Water Company could not be conferred upon it except by ordinance, there is no doubt that under the statutes and general law the contract with the city for the supplying of water could be authorized, made and directed by resolution of the counsel.

So far, then, no portion of this ordinance can be said to be in this controversy except that portion relating directly to the contract for the city's particular water. No proceeding directly setting aside this or-

dinance has ever been instituted. The Water Company is exercising powers and privileges at the present time with the consent of the city under the ordinance. The acts of ratification are numerous and complete. At a regular meeting of the Council, concerning which there can be no doubt of its validity, the proceedings of the special meetings adopting this ordinance and authorizing this contract were read and approved. If, therefore, the ordinance could be passed and the contract authorized at a regular meeting, they might be ratified at a regular meeting.

The only limitation upon the power of ratification is that a city may not ratify an act which it was not originally by law empowered to do. But a city can undoubtedly ratify any lawful contract originally entered into without the authority of the council, by the agents of the city, or the authority for which was defective.

In the case of *Supervisors* vs. *Schenck*, 5 Wall., 781, this rule of law is firmly established in the body of the Federal law, and has been consistently followed in numerous decisions. Quoting from the opinion:

> "Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts of ratification were performed, or if the contract was illegal, immoral, or against public policy. Like an individual, a corporation may ratify the acts of its agents done in excess of authority, and such ratification may, in many cases, be inferred from acquiescence in those acts, as well as from express adoption. Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name; and it was held, in *Peterson* vs. *The Mayor of New York*, that the

principle is as applicable to corporations as to individuals. Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."

Hoyt vs. *Thompson*, 19 N. Y., 218.
Bank of U. S. vs. *Dandrich*, 12 Wheat., 70.
Peterson vs. *Mayor of N. Y.*, 17 N. Y., 453.
Angell & Ames on Corp., Secs. 237, 304.
2 *Kent's Com.*, 11 Ed., p. 348.
Bissell vs. *Railroad*, 22 N. Y. 264.

All of which authorities are cited approvingly by the Supreme Court.

In the case of *Peterson* vs. *Mayor*, a member of the council had, without any authority on the part of the council, engaged an architect to draw plans for a market house. These plans were subsequently reported by a committee to the council, who adopted them and caused bids to be made on the basis of the plans. The Court held the subsequent submission of bids on these plans by the Council to amount to a ratification of the employment of the architect and an agreement to pay him. The Court says:

"This ratification may be by express assent, or by acts or conduct of the principal inconsistent with any other supposition than that he intended to adopt and own the act done in his name. I am of opinion that the principle is as applicable to corporations as to individuals Chancellor Kent says, 'the doctrine that corporations can be bound by implied contracts to be deduced by inference from

corporate acts, without either a vote or deed or writing, is generally established in this country with great clearness and solidity of argument."

In this case, one of the acts of ratification is the payment of hydrant rental under the contract by the city. That this forms the office of ratification, see *Supervisors* vs. *Schenck*, *supra*, and *Knapp* vs. *Grant*, 27 Wis., 151; *State on relation of Garrett et al.* vs. *Van Horne*, 7 O. St., 331; *Shoemaker* vs. *Goshen Tp.*, 14 O. St., 587; *Society for Savings* vs. *New London*, 29 Conn., 190; *L. L. & G. R. R. Co.*, vs. *Douglass Co.*, 18 Kan., 169.

It appears in evidence that there was absolutely no secrecy about this transaction; that prior to or about the time that the contract was entered into, several hundred copies of the contract, including the ordinance, were printed and freely distributed by individuals and the newspapers; that the work went on under the eyes of the citizens of the City, and with the assent and direction of the Council; and when it was completed, was tested in the presence of the agents of the City Council, and solemnly accepted; that the City celebrated its completion by a public festivity and paid for the cost of the demonstration out of the city treasury; that it from time to time considered petitions presented to it by citizens of the City, asking for an extension of the privileges of the waterworks and the location of hydrants, and that it indeavored to induce the county to pay for hydrants erected so as to protect county property.

The city, standing by and seeing work done and money expended on the faith of the validity of the contract, is estopped from denying the same after it has received the benefits of the contract.

Society for Savings vs. *New London*, 29 Conn., 193.
Kneeland vs. *Gilman*, 24 Wis., 42.
Moore vs. *Mayor*, 73 N. Y., 238.

In *Kneeland* v. *Gilman*, 24 Wis., 42, the Court says :

> "But as to matters within the scope of their powers, the doctrine of estoppel, and that agreements made in their behalf may be ratified by acquiescence and accepting the benefit of them, with knowledge of the facts, is as well settled [in the case of municipal corporations] as it is in the case of natural persons."

See also

Howe v. *Keeler*, 27 Conn., 538, where the Court said :

> " A ratification of the acts of an agent of a corporation in making a contract in its behalf may be implied by acts of the corporation as well as expressed by its vote."

See

Dill Munc. Corp., 5th Ed., p. 460, and cases cited.

The case of *Mills* vs, *Gleason*, 11 Wis., 470, is a case which in principle fully covers this contention.

The city of Madison, Wisconsin, before the publication of its charter and before it had legally any right to act as a corporation, issued a large number of bonds for the purpose of constructing a public building, and for general public use. Subsequent to this unauthorized and unlawful act, the city charter was published, and subsequent to its publication and after the commencement of its rightful exercise of corporate powers, it levied a tax for the payment of interest on these bonds. This, in a very able opinion, the Supreme Court of Wisconsin declares to be a ratification of the unauthorized and unlawful act, because the act, which was originally unauthorized and unlawful when done, was within the

terms of the charter powers of the corporation when ratified. We quote from the opinion of the Court:

> "In the case, *Clark* vs. *the City of Janesville*, the majority of the court held that the charter of that city was a public and therefore a general law, within the meaning of the constitutional provision that no general law should be in force until published. The charter of the city of Madison was not published until after the issue of the bonds whose validity is questioned in this suit, and the case would, therefore, be governed by that decision unless, as is claimed on the other side, the city, after it did acquire an existence as such, by the publication of the charter, did some act ratifying the issue of the bonds, so as to bind itself. The ground of objection is one of a technical character, and although it must prevail where the case comes within it, yet a stronger case could not well be presented for applying the doctrine that a subsequent ratification will render valid, acts that in point of strict law were unauthorized when they were done. This is a familiar rule in the case of individuals. If a man without any authority assumes to act as the agent of another, although the act, as to the other, is of no validity, yet if he subsequently ratifies it, and adopts it, and receives the benefit of it, he is as much bound as if he had authorized it in the first instance. And we think this principle is applicable to this case. Here everything was done necessary to authorize the issuing of the bonds, except the publication of the charter, all the parties, however, supposing it to be in force. If, after it was in force, the city received the proceeds, and appropriated them to its use, and recognized the validity of these bonds, we could not well imagine a case more fit for the application of this rule. * * * * It

appears from the evidence that the proceeds of the bonds went into the treasury of the City, and were expended by it, and that after the charter was in force, their validity was recognized by levying a tax for the payment of the interest. We think this ratifies them and binds the city, provided it would have been bound, if the charter had been in force at the time they were issued."

In *Marsh* vs. *Fulton Co.*, 10 Wall., 676, the Court holds that ratification may be made if the act ratified was within the enumerated powers of the municipality, by holding the converse of the proposition, that if not within the enumerated powers of the corporation, it could not be ratified.

See also

Joseph Crawshaw vs. *City of Rocksbury*, 73 Mass., 374.
Emmerson vs. *Inhabitants of Newbury*, 30 Mass., 377.
T. F. Sullivan & Co. vs. *School Dist.*, No. 39, of
Brown Co., Kansas, et al., 39 Kan., 347.

In the case of the *People, ex. rel. Alexander* vs. *Charles Swift, President of the Board of Trustees of the City of Sacramento*, 31 Cal., 26, it is held by the Court:

"In all matters in which a municipal corporation has power to contract, a subsequent ratification of a contract entered into on its behalf without authority, and which does not bind it, binds the corporation as effectually as though it had contracted in the first instance."

In this case the work was performed, and the city Referee found that the services constituting the basis of

the relator's claim were not performed under any contract with the city. The relator acted under the direction or on the suggestion of one, or perhaps two, of the three Trustees, but he was not employed by the Board as such. After the work had been performed, however, the Board of Trustees accepted the job as having been performed on the city's account, and in the clear exercise of the powers conferred upon them by the charter the Board passed an ordinance on the 17th of July, 1864, appropriating from the general fund the sum of $574.38 for the payment of the claim.

This subsequent ratification by the Board, within their powers, and according to the method of contracting pointed out in their charter, the Court says, bound the city as effectually as an employment in advance would have done. After the warrant was issued, the city refused to pay it, and the defence was put in to a writ of mandamus brought to enforce the warrant.

In the case of *Argenti* vs. *City of San Francisco*, 16 Cal., 255, the Court says:

> "It is well settled in relation to the contracts of corporations, that where the question is one of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the contract cannot be permitted in an action founded upon it, to question its validity. * * * * We shall show that this rule applies with equal force to all corporations, public or private.
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> "Contracts of corporations, stand upon the same footing as those of natural persons, and depend upon the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals,

and the former are bound by the acts of their agents in the same manner and to the same extent as the latter."

Apart from the question of ratification, the tendency of the Courts of late years has grown stronger year by year to apply the same rule as to public corporations which is now universally applied to private corporations —that such corporations cannot contest the validity of an executed contract.

> "As a rule, the powers of corporations, municipal or others, must be exercised in the mode pointed out in the charter. But even a want of authority is not, in all cases, a sufficient test of the exemption of the corporation from liability in matters of contract. An executory contract, made without authority, cannot be enforced; but where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned."

So held by the Court in *Argenti* vs. *City of San Francisco*, 16 Cal., 256.

A recent important case decided by the Kansas Court, and reported in 39 Kans., p. 37, is the case of *Brown* vs. *The City of Atchison*, showing this judicial tendency. We quote the language of the Court:

> "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it or to enter into it, but the contract is not immoral, inequitable or unjust, and the contract is performed, in whole or in part, by and on the part of one of the parties, and the other party receives benefits by reason of such per-

formance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render, and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party, by either rescinding the contract, and placing the other party *in statu quo*, or by accounting to the other party for all benefits received, for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit."

UNLESS THE APPEAL IS DISMISSED, THE DECREE SHOULD BE AFFIRMED UPON THE MERITS.

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